SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 1142

In the Matter of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

ABEX CORP., ARTHUR ANDERSEN & COMPANY, BETHLEHEM STEEL CORPORATION, *et al.*,

Petitioners,

—against—

TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *et al.*,

Respondents.

BRIEF ON BEHALF OF THE DEBTOR'S BONDHOLDERS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Should this Court consider whether the United States Court of Appeals for the Second Circuit erred in holding that claims of unsecured creditors who had furnished materials, supplies and services during the six months preceding the commencement of the reorganization of a railroad are not entitled to payment out of the corpus of the railroad's mortgaged property where the railroad

was operating at a deficit during the six months preceding reorganization and has operated at a deficit since reorganization commenced and there has been no diversion of income for the benefit of bondholders?

Argument

Petitioners furnished materials, supplies and services to The New York, New Haven and Hartford Railroad Company (the "New Haven") within six months of the filing of the New Haven's petition for reorganization. In the courts below, Petitioners sought to obtain payment of their claims out of the mortgaged property of the New Haven under the so-called six-months rule which was fashioned by this Court in equity railroad reorganizations in the last century and incorporated into present railroad reorganization procedures by Section 77(b) of the Bankruptcy Act, 11 U.S.C. §205(b) (1964). In their brief to this Court, Petitioners concede that under *Gregg* v. *Metropolitan Trust Co.,* 197 U.S. 183 (1905), the last holding by this court on the six-months rule, "six-months priorities may only be recognized to the extent of any surplus 'fund' which might arise from railway operating profits (or diversion thereof for the benefit of the bondholders)." (Petition, 6-7)

In the courts below Petitioners failed to show the existence of any "current expense fund" out of which six-months creditors could be paid or of any diversion of current income for the benefit of mortgage creditors. The courts below held that the Petitioners had failed to meet the requisites for achieving priority under the six-months rule. *Cf. Fosdick* v. *Schall,* 99 U.S. 235 (1879); *Gregg* v. *Metropolitan Trust Co., supra.*

Petitioners now ask this Court to cast aside what they concede to be the traditional requirements of the six-months rule so as to permit any unsecured creditor who furnishes materials, supplies or services to a railroad within six months before a petition for reorganization is filed to be paid out of the corpus of the mortgaged property, although there has been no diversion for the benefit of mortgagees. Nothing in Section 77 or other statutes supports such change in the six-months rule, and Petitioners have made no showing that such an extension is desirable in the public interest. Maintenance of safe railroad operations can be assured through reorganization pursuant to Section 77. As the Reorganization Court noted, modification of the six-months rule to pay Petitioners' claims out of mortgaged property might have the effect of prolonging unstable railroad operations past the time when they should have been subject to the supervision of a Section 77 reorganization court. (Petition, 29A)

There is no conflict between the holding of the Second Circuit in this case and the holding of *Southern Ry.* v. *Flournoy,* 301 F.2d 847 (4th Cir. 1962). The *Flournoy* case involved an application of the "necessity of payment" rule which was developed in this Court's earlier decision of *Miltenberger* v. *Logansport Ry.,* 106 U.S. 286 (1882). As this Court pointed out in *Gregg, Miltenberger* turned upon findings, absent here, that *actual payment* for services rendered was necessary to keep a railroad in operation. 197 U.S. at 187.

CONCLUSION

For the reasons set forth above and the reasons set forth in the brief of the New Haven Trustee, which we endorse, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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